



**Issue Date: 26 December 2002**

CASE NO: 2002-ERA-3

In the Matter of

JEROME REID  
Complainant

v.

NIAGARA MOHAWK POWER CORPORATION  
Respondent

**RECOMMENDED DECISION AND ORDER OF DISMISSAL  
FOR FAILURE TO COMPLY WITH LAWFUL ORDERS**

After reviewing Respondent Niagara Mohawk Power Corporations' Motion for issuance of an Order to Show Cause as to why the above-captioned complaint under Section 211 of the Energy Reorganization Act ("ERA") should not be dismissed, I issued an Order to Show Cause on November 26, 2002, and conducted a telephone conference with the parties on December 9, 2002 in connection with that Order. Having reviewed and considered all of the submissions and arguments of the parties regarding Respondent's motion, and after due deliberation, I make the following findings of fact, conclusions of law, and order with respect to this matter.

**FINDINGS OF FACT**

1. The hearing in this case was initially scheduled to be held on May 7, 2002, pursuant to an Order issued by me on or about November 1, 2001.
2. On or about April 16, 2002, Respondent Niagara Mohawk Power Corporation ("Respondent") filed a Motion for issuance of an Order to Show Cause as to why the complaint should not be dismissed for various procedural reasons.
3. On April 25, 2002, I conducted a telephone conference with the parties during which Complainant Jerome Reid ("Complainant") requested an adjournment of the May 7, 2002 hearing in order to allow him additional time to attempt to retain legal counsel.
4. On April 26, 2002, I issued an Order granting Complainant's request for a continuance of the May 7, 2002 hearing. In that Order, I rescheduled the hearing for September 17, 2002, and directed Complainant to have legal counsel file a notice of appearance by June 7, 2002, if he retained legal counsel. The Order also directed Complainant to be prepared to proceed without an attorney if he did not retain an attorney by June 7, 2002, and I reserved ruling on Respondent's

motion to dismiss. Complainant was also directed in the Order to file and serve responsive papers with respect to Respondent's motion within 20 days of June 7, 2002 or the filing of his attorney's notice of appearance, whichever occurred earlier.

5. Complainant did not retain an attorney by June 7, 2002. Complainant also did not file and serve responsive papers with respect to Respondent's motion by June 27, 2002, despite having been specifically directed to do so by said April 26, 2002 Order.

6. Respondent served, by certified mail, return receipt requested, a Notice to Take Deposition and Request for Production of Documents on Complainant, which required Complainant to provide the requested documents by September 12, 2002 and to attend a deposition on September 12, 2002.

7. On or about August 20, 2002, Complainant sent a letter to me requesting another adjournment of the hearing in this case. Respondent opposed Complainant's request for an adjournment by letter dated August 27, 2002.

8. On September 4, 2002, I issued an Order granting Complainant's request for an adjournment, and rescheduled the hearing for December 10, 2002. In that Order, I explicitly directed Complainant to attend his deposition, scheduled for September 12, 2002. That Order also specifically advised Complainant that his failure to appear at his deposition without good cause would result in dismissal of his complaint.

9. Complainant failed to attend his deposition on September 12, 2002, despite having been specifically directed to attend by Order of September 4, 2002. Complainant also did not contact Respondent or its attorneys' prior to the deposition to tell them that he would be unable to attend, causing Respondent to incur unnecessary costs and inconvenience. Complainant similarly did not contact Respondent or its attorney at any time after September 12, 2002 to explain why he failed to appear for his deposition.

10. Complainant additionally did not respond to Respondent's Request for Production of Documents, although he was also required to do so by Respondent's discovery request and pursuant to the applicable procedural requirements.

11. On or about November 1, 2002, Respondent filed a renewed Motion for issuance of an Order to Show Cause as to why the complaint should not be dismissed on the grounds that: (1) Complainant failed to comply with lawful orders; (2) Complainant failed to prosecute his complaint and effectively abandoned his claims; (3) Complainant failed to comply with the applicable regulations regarding the filing of a timely and effective request for an administrative hearing; (4) the Office of Administrative Law Judges lacked jurisdiction over Complainant's complaint to the extent that it was

based on Section 11(c) of the Occupational Safety and Health Act (“OSHA”); and (5) Complainant’s allegations were legally and factually insufficient to an actionable claim under the ERA or OSHA.

12. On November 26, 2002, I issued an Order to Show Cause, directing Complainant to file and serve a response within 10 days demonstrating good cause for his failure to comply with his prior Orders and his failure to attend his September 12, 2002 deposition.

13. Complainant failed to file and serve any substantive response pursuant to my November 26, 2002 Order.

14. On December 9, 2002, I conducted a telephone conference with the parties, during which Complainant was given the opportunity to explain his failure to attend his deposition and his failure to comply with my prior orders. Complainant failed to show good cause.

### CONCLUSIONS OF LAW

Section 24.6(e)(4) of the governing regulations specifically authorizes dismissal of ERA claims when a complainant fails “. . . to comply with the lawful order of the administrative law judge.” 29 C.F.R. § 24.6(e)(4).

Complainant’s complete disregard for and failure to comply with three separate Orders including his failure to attend his scheduled deposition without good cause, constitutes a proper basis for dismissal of the complaint. *See e.g., Billings v. Tennessee Valley Authority*, 89-ERA-15 (ALJ 11-1-90) (complainant’s disregard of two orders to furnish pretrial submissions and failure to attend depositions warranted dismissal of the complaint); *Sec’y of Labor v. Sunrise Property and Development, Inc.*, 1999-FL-15 (ALJ 1-4-00) (failure to respond to discovery requests and failure to appear at properly noticed depositions warranted default judgment against respondent); *Querin v. Fluor Daniel Hanford, Inc.*, 1998-TSC-3 (ALJ 4-20-02) (complainant’s failure to appear at scheduled deposition warranted dismissal of complaint).

### ORDER

Having considered Respondent’s motion to dismiss, and based on the foregoing Findings of Fact and Conclusions of Law, the Court recommends that the Secretary enter the following order:

IT IS ORDERED that Complainant’s complaint in Case No. 2002-ERA-3 is dismissed in its entirety, with prejudice, due to his failure to comply with the prior Orders of the presiding administrative law judge and his failure to appear at his September 12, 2002 deposition without good cause; and it is further

ORDERED that a ruling on the other grounds for dismissal set forth in Respondent's motion papers is unnecessary at this time in view of the decision reached with respect to Complainant's failure to comply with the presiding administrative law judge's Orders and failure to attend his deposition without good cause.

A

MICHAEL P. LESNIAK  
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 2000 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.